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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM 1952

No. 648

BRADLEY MINING CO., A corporation,
Petitioner,

v.

EDWARD H. BOICE,
Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

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Petition for Rehearing of Order Denying Petition for Writ of Certiorari

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable The Associate Justices of the Supreme Court of the United States:

Petitioner, Bradley Mining Co., a corporation, as petitioner, heretofore filed its petition for writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit. That petition was denied and now, within the time allowed by the rules, as extended by order of Mr. Justice Douglas, this petition for rehearing is filed, agreeably to paragraph 2 of Rule 33, upon what is believed to be a substantial ground available to petitioner although not previously presented as a ground for certiorari (but see

"Supplement to Reply Brief of Petitioner," referred to below).

This petitioner took an appeal to the United States Court of Appeal for the Ninth Circuit from a judgment of the United States District Court for the District of Idaho. This appeal was heard and determined by a division of three of the seven judges of the United States Court of Appeals for the Ninth Circuit who were in active service. On December 5, 1951 that division of the court, one judge dissenting, rendered its decision affirming the judgment of the District Court (R. 2204 ff; 194 F.2d 80). What then happened in this matter and in *Western Pacific Railroad Corporation, et al. v. Western Pacific Railroad Company, et al.*, in the United States Court of Appeals for the Ninth Circuit, No. 12506, developed the undetermined question of law, important to the administration of justice in the federal courts, which, we believe, calls for the exercise of this court of its power of supervision of the administration of justice in the lower federal courts (Rule 38, 5(b); *Thiel v. So. Pac. Co.*, 328 U.S. 217, 225) and created the anomolous and uncertain procedural situation in which this petitioner now finds itself and which requires this petition for rehearing in order that this petitioner be not deprived of a substantial right by "default" as it were.

QUESTION PRESENTED

After the decision against it, this petitioner, appellant in the United States Court of Appeals for the Ninth Circuit, presented to that court as a whole a petition for rehearing en banc. This petition was denied by two of the three judges who sat in the division which decided the case. The question

is whether such a petition can be so disposed of, without presenting it to the full court in view of 28 U.S.C. Sec. 46(c) which provides:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, *unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service.* A court in banc shall consist of all active circuit judges of the circuit." (Emphasis ours.)

Except as we shall notice, this question has not been presented to this court.

STATEMENT OF THE PROCEEDINGS DEVELOPING THE QUESTION PRESENTED

After the decision against it by the Court of Appeals, this petitioner presented to that court "Appellant's Petition for a Rehearing En Banc." The petition was addressed "To: The Honorable, the Chief Judge, and to the Honorable, the Circuit Judges of the United States Court of Appeals for the Ninth Circuit." The petition expressly stated "grounds for rehearing en banc" and, throughout, asked for action by the full court of seven circuit judges of the circuit who were in active service.

On January 23, 1952 two of the three judges who sat in the division which decided the case purported to deny the petition for a rehearing en banc and this order (R. 2226) was made:

> "Upon consideration thereof, and by direction of the Court, it is ordered, by Circuit Judges Healy and Bone, that the petition of appellant, filed January 18, 1952, and within time allowed therefor by Rule of Court, for a rehearing of the above case be, and hereby is denied."

Following this, and on March 11, 1952, petitioner, unaware of the question which lurked, forwarded to this court its petition for writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit adverse to petitioner. This petition, in its statement of questions presented (pp. 2, 3) and reasons for allowance of the writ (p. 14) did not refer to the question here presented and did not present it as a ground for certiorari. An opposition to this petition was filed and, on April 22, 1952 petitioner prepared and forwarded to this Court its reply brief.

Respondent's brief in opposition to the granting of certiorari, at page 9, made the statement that the denial of the petition for rehearing indicated that at least a majority of all of the judges of the Ninth Circuit had determined that the judgment of the District Court was not in error. Petitioner's reply brief took issue with this and quoted the record, but did not enlarge on the grounds for certiorari stated. After this reply was dispatched the question was brought to the attention of petitioner's counsel and inquiry was made at once.

On making inquiry petitioner learned that in the proceeding in the United States Court of Appeals for the Ninth Circuit entitled and numbered *Western Pacific Railroad Corporation, et al. v. Western Pacific Railroad Company, et al.*, No. 12506, after decision a petition for rehearing en banc was filed and, on January 30, 1952, seven days after the denial of this petitioner's petition for rehearing, was ordered stricken by two of the three judges who sat on the case, on the authority of *Kronberg v. Hale*, 181 F.2d 767 (Circ. 9, 1950), and that thereafter the petitioner for the rehearing in the *Western Pacific Case* filed in the

Court of Appeals for the Ninth Circuit a petition "For Leave to File a Motion to Vacate Order Striking Appellant's Petition for Rehearing En Banc and Reinstating Such Petition" and obtained an extension of time to file a petition for certiorari in this Court to June 27, 1952.

This petitioner immediately undertook an examination of the decisions, particularly the *Independence Lead Mines Co. v. Kingsbury* in the Ninth Circuit with its very vigorous dissent by Chief Judge Denman, the decisions in *Freuhauf Trailer Co. v. Myers,* 181 F.2d 1008 (Circ. 9) and *Northwestern Mutual Life Insurance Company v. Gilbert,* 182 F.2d 256 (Circ. 9) and more particularly the decisions of this Court in *Textile Mills Securities Corporation v. Commissioner,* 314 U.S. 326, 333 and *United States ex rel. Robinson v. Johnston,* 316 U.S. 649.

This examination led petitioner to the conclusion that at the very least there was a serious question whether it was competent for two judges of a division of three of a United States Court of Appeals to foreclose consideration of a petition for a rehearing en banc by the full court by a denial of the petition or by an order striking it.

This inquiry also presented this petitioner with the dilemma whether the proper procedure was to present the matter to this Court, although it had not been made a ground for the petition for certiorari, or to proceed in the Court of Appeals for the Ninth Circuit. Petitioner concluded that the only safe course was to proceed in both courts.

On April 29, 1952 this petitioner prepared and forwarded for presentation to this Court a supplement to its reply brief in which it called attention to the situation. This

Court on May 5, 1952 denied its petition for certiorari in this matter. We cannot know whether in denying the petition this Court gave consideration to the matter set out in our supplement to petitioner's reply brief or, if it did, whether it concluded that the matter did not warrant consideration (contrary to the intimations in the *Textile Mills Case* and *United States ex rel. Robinson v. Johnson*) or whether the point was premature and petitioner's appropriate remedy was in the Court of Appeals for the Ninth Circuit by application for leave to present the matter to the full court.

On May 7, 1952 petitioner presented a motion to the United States Court of Appeals for the Ninth Circuit, moving the court to vacate the two-judge order of January 23, 1952 denying petitioner's petition for a rehearing en banc and to reinstate said petition, on the authority of 28 U.S.C. Sec. 46(c) and of *United States ex rel. Robinson v. Johnson* and *Textile Mills Corporation v. Commissioner* and presented with this an application to the United States Court of Appeals for the Ninth Circuit, addressed to all of the judges of that court in active service, requesting leave to file the motion. A copy of the application and the motion are attached as Appendix A hereto.

Having obtained a stay of mandate to enable it to do so, petitioner then applied to Mr. Justice Douglas for an extension of time to file this petition for rehearing to June 27, 1952, the same time to which the time for filing a petition for certiorari in the *Western Pacific Case* had been enlarged. It was hoped that in the meantime some action by the United States Court of Appeals for the Ninth Circuit might have clarified the situation.

The United States Court of Appeals for the Ninth Circuit has not taken any action on either the application for leave to file a motion to vacate the order striking the petition for rehearing en banc in the *Western Pacific Case* or on this petitioner's application for leave to file a motion in this case. Such action may be taken before this court sits in October 1952 for the October 1952 term. But, in the meantime, this petitioner is forced to file this petition for rehearing to preserve its position for the reasons now to be noticed.

GROUND FOR THIS PETITION FOR REHEARING

If in the *Western Pacific Case* either the United States Court of Appeals for the Ninth Circuit or this Court decides that it is not competent for two judges of a division of three of a United States Court of Appeals to foreclose consideration of a petition for rehearing en banc by all of the members of the court, then petitioner, being in like case, should have the benefit of such a decision. Independently, this petition should have a decision in its own case.

If the decision is that an order of two judges, of the three judges who sat, denying a petition for rehearing en banc, or striking it, is beyond their competence, and a nullity, the petition is still pending for determination by the full court and it would seem further proceedings are premature. We can not know that the Court of Appeals will so hold. If the Court of Appeals holds that a division of the court, or two judges of such a division, properly can deny or strike such a petition, then the order made in this case on January 23, 1952 is, so far as the Court of Appeals for the Ninth Circuit is concerned, final and can be reviewed

only on petition for certiorari filed within time after January 23, 1952. In this case the matter was not presented to this court, as a ground for reviewing judgment of the United States Court of Appeals, in the petition for certiorari. It was suggested only in a supplement to petitioner's reply brief which petitioner felt it necessary to file.

It is believed that in the light of the decisions of this court in *Textile Mills Corporation v. Commissioner,* 314 U.S. 326, 333, *U. S. ex rel. Robinson v. Johnson,* 316 U.S. 649 and 28 U.S.C. § 46(c) the order of Judges Healy and Bone denying this petitioner's petition for rehearing en banc, without consideration of that petition by all of the judges of the court in active service, was in error.

So far as we know, no case has given consideration to the statute, 28 U.S.C. § 46(c).

LEGISLATIVE HISTORY OF TITLE 28 U.S.C., SEC. 46(c)

Title 28 U.S.C. Sec. 46(c) was occasioned by a conflict between the Ninth Circuit and the Third. In *Lang's Estate v. Commissioner,* 97 F.2d 867 (1938), the Ninth Court held that there was no basis in law for hearings or rehearings en banc. The Third Circuit held to the contrary in *Commissioner v. Textile Mills Corporation,* 117 F.2d 62 (1940). On certiorari in the *Textile Mills* case, the Supreme Court upheld the Third Circuit (314 U.S. 326).

It was then felt that the procedure approved by the Supreme Court should find more explicit expression in the statute, and S. 1053 was introduced in the 77th Congress to amend Section 212 of old Title 28 U.S.C. This bill was not then enacted, but it was adopted in substance when the Judicial Code was revised in 1948, becoming Section 46(c).

On August 16, 1948 Mr. Henry P. Chandler, Director of the Administrative Office of the United States Courts, transmitted to the Courts of Appeal the Final Report of the Committee on Codification and Revision of the Judicial Code (Judge Maris, Third Circuit, Chairman). This report states the contents of Section 46(c) and adds:

> "These new provisions will call for changes in the rules of each of the Circuit Courts of Appeal."

It appears, however, that the rules of the Court of Appeals for the Ninth Circuit were not changed as a consequence of the new Judicial Code, except as to the name of the court and the title of the Chief Judge.

In the hearings before the Subcommittee on Judiciary on S. 1053, 77th Congress, 1st Session, the following occurred:

> "Senator Danaher: • • • On whose motion would the court assemble en banc?
>
> • • • • • • • •
>
> "Senator Danaher: Who is going to make a motion that the whole court sit on this case? The counsel in the case?
>
> • • • • • • • •
>
> "Mr. Chandler: The counsel can make a suggestion of course." (p. 16)

Again:

> "Senator Danaher: Judge Groner, do you gentlemen of the bench have any thought to give us as to how we are going to let a majority of the circuit judges decide • • • when they are going to convene the court en banc?
>
> "Judge Groner: Well, I never thought of that. My own thought in the administration of my own court would be that it would not be done unless counsel requested it, or unless the court of its own motion • • • deemed it advisable • • •" (p. 40)

The history of Ninth Circuit determinations in connection with petitions for rehearings en banc shows the adopted practice of not presenting such petitions to the attention of the full court—at times even over the protest of the Chief Judge. It is clear therefore that a litigant in the Ninth Circuit, as in the present case, is deprived of a proper consideration and determination of such petitions—contrary to the obvious intention of Section 46(c) which provides that such petitions may be ordered *by a majority of the Circuit Judges of the Circuit.* Under the Ninth Circuit practice 3 judges and often 2 judges, as in the case at bar, may prevent the majority of the 7 judges from even being aware of the request for relief which the statute empowers the majority of 5 judges to grant.

We submit that as stated in *Textile Mills v. Commissioner,* 314 U.S. 326, 333, more effective judicial administration results from a decision en banc because "conflicts within a circuit will be avoided, finality of decision in the Circuit Courts of Appeals will be promoted. Those considerations are especially important in view of the fact that in our Federal judicial system, these courts are the courts of last resort in the run of ordinary cases."

This petition for rehearing is necessary to keep petitioner's petition for certiorari *in fieri,* since if the United States Court of Appeals for the Ninth Circuit takes such action that, so far as that court is concerned, the order was a proper one its propriety can be reviewed by this court only on a writ of certiorari granted on an application made within time after the order of January 23, 1952.

It is suggested that the proceedings in this case should be the same as upon the same question presented in the

Western Pacific Case. It would seem appropriate that this petition be held with leave to the petitioner to advise this court promptly upon action being taken by the United States Court of Appeals for the Ninth Circuit.

If this be not appropriate then it is suggested that the order denying certiorari without more should be modified to remand the cause to the Court of Appeals for the Ninth Circuit without prejudice for proceedings on petitioner's application to the full court for a rehearing en banc.

Dated at San Francisco
June 24, 1952.

Respectfully submitted,

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CERTIFICATE

The undersigned, counsel for Bradley Mining Co., a corporation, the petitioner in the foregoing petition, certify that the foregoing petition is presented in good faith and not for delay and that said petition is restricted to a substantial ground available to petitioner but not previously presented as a ground for granting the petition for certiorari (although called to the attention of the Court in a "Supplement to Reply Brief of Petitioner," as appears from the foregoing petition).

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APPENDIX A

No. 12,684

IN THE

United States Court of Appeals

For the Ninth Circuit

BRADLEY MINING CO., A Corporation,
Appellant,

vs.

EDWARD H. BOICE,
Appellee.

Petition for Leave to File a Motion to Vacate Order Denying Appellant's Petition for a Rehearing en Banc and Reinstating Said Petition and Determination Thereof by the Full Court and for Stay of Mandate.

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No. 12,684

IN THE

United States Court of Appeals

For the Ninth Circuit

BRADLEY MINING CO., A Corporation,
Appellant,

vs.

EDWARD H. BOICE,
Appellee.

Petition for Leave to File a Motion to Vacate Order Denying Appellant's Petition for a Rehearing en Banc and Reinstating Said Petition and Determination Thereof by the Full Court and for Stay of Mandate.

To: The Honorable William Denman, Chief Judge, and to the Judges of the United States Court of Appeals for the Ninth Circuit in Active Service:

The petition of appellant Bradley Mining Company, a corporation, respectfully shows:

The above entitled matter was pending in this Court on appellant's appeal duly and regularly taken and was decided adversely to appellant on December 5, 1951 (R. 2204 ff., 194 F.2d 80), by Judges Healy and Bone. Judge Pope filed a full and vigorous dissent. The opinions are set out

in full in Appendix A to the Petition for a Rehearing En Banc.

Within time appellant filed herein its "Petition for a Rehearing En Banc," addressed to *all* the Judges of the Court. On January 23, 1952, two judges of this Court, Judges Healy and Bone, purported to make an order denying said petition. A copy of the record in that regard is Appendix I hereto.

Thereafter appellant applied to the Supreme Court of the United States to review the action of this Court by granting a writ of certiorari. Said petition has been denied. The point made in this petition was not made as a ground for certiorari although matters herein referred to were stated in a supplement to a reply brief challenging a statement of appellee-respondent that a majority of the members of this Court had acted in this case.

This petition asks leave to file a motion to vacate the above order of Judges Healy and Bone of January 23, 1952, and for consideration of appellant's petition for hearing en banc by this Court, by the full Court. A copy of said motion is attached hereto as Appendix II.

This petifion further asks that the mandate of this Court be stayed until determination of this petition and, if this petition be granted, thereafter until determination of this petitioner's proposed motion and for such further time as is appropriate.

DISCUSSION

The record (App. I) shows that only two judges, not a majority of seven, denied the petition for rehearing en banc—the same two judges, Judges Healy and Bone, who joined in the majority opinion. The record shows that the

petition for rehearing en banc was before only three judges (App. I).

The petition for rehearing was entitled "Appellant's Petition for a Rehearing En Banc." The petition was addressed: "To: The Honorable, the Chief Judge, and to the Honorable, the Circuit Judges of the United States Court of Appeals for the Ninth Circuit." The petition expressly sets forth "grounds for rehearing en banc" and requested, throughout, action by the full court of 7 judges.

Title 28 U.S.C. Section 46(c), provides:

> "(c) Cases in controversies shall be heard and determined by a Court or division of not more than three judges, *unless a hearing or rehearing before the Court en banc is ordered by a majority of the Circuit Judges of the Circuit who are in active service.* A Court en banc shall consist of all active circuit judges of the Circuit."

In denying the petition below for a rehearing en banc, 2 judges by their action foreclosed consideration of the petition by the majority of the Ninth Circuit judges.

How can the clear Congressional intent expressed in the above Judicial Code section possibly be carried out if a petition for rehearing en banc addressed to the full complement of 7 judges of a Circuit is not presented to all 7 judges for *majority* action—but is distributed and submitted for determination *only* to a *minority* panel of the three judges who acted on the appeal? Such practice and determination is directly in conflict with the above Judicial Code section. The Code section specifically provides for an order "for a hearing or rehearing en banc by a *majority* of the Circuit judges of the circuit"—*not* by a majority of a

panel or *division* of a Circuit. Obviously this practice of the Ninth Circuit—as demonstrated in the instant case—amounts to a nullification of Section 46(c).

HISTORY OF SECTION 46(c)—NINTH CIRCUIT PRACTICE

In *Lang's Estate v. Commissioner,* 97 F.(2d) 867 (1938), this court held that there was no basis in law for hearings or rehearings en banc. A contrary holding in *Commissioner v. Textile Mills Corporation,* 117 F.2d 62 (1940) (Circ. 3) was affirmed in 314 U.S. 326. A bill (S. 1053)—introduced in the 77th Congress in an effort to amend Section 212 of old Title 28 U.S.C. to clarify the statute—was not enacted but was adopted in substance as Section 46(c) when the Judicial Code was revised in 1948.

According to the reviser's note this Section 46(c) "preserves the interpretation established by the Textile Mills case"—*Textile Mills v. Commissioner,* 314 U.S. 326, 333, 86 L.Ed. 249 (1941). Justice Douglas in delivering the opinion in the *Textile Mills* case in support of a Circuit Court decision rendered en banc refers to the history of old Title 28 U.S.C. and stated:

> "Certainly the result reached makes for more effective judicial administration. *Conflicts within a circuit will be avoided, finality of decision in the circuit courts of appeals will be promoted.* Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they

aid in tipping the scales in favor of the more practicable interpretation."

In *U. S. ex rel. Robinson v. Johnston,* 316 U. S. 649, 86 L.Ed. 1732 (1941) the Supreme Court on certiorari to the Court of Appeals for the Ninth Circuit—citing the *Textile Mills* case—vacated the Ninth Circuit Court's judgment and remanded the case "for further proceedings, *including leave to petitioner to apply for a hearing before the Court en banc,*" stating:

> "In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston (C.C.A. 9th), 118 F.(2d) 998, 1001, and Crockett v. United States (C.C.A. 9th), 125 F.(2d) 547-549) and in view of this Court's decision in Waley v. Johnston, 316 U.S. 101, ante, 1302, 62 S.Ct. 964, reversing (C.C.A. 9th), 124 F.(2d) 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including leave to petitioner to apply for a hearing before the court en banc. See Textile Mills Corp. v. Commissioner of Internal Revenue, 314 U.S. 326, ante 249, 62 S.Ct. 272."

After the above decision of the Supreme Court in the Johnston case, this Court on its own motion ordered a hearing en banc and reversed its earlier decision—see *Robinson v. Johnston,* 130 F.2d 202 (1942).

Approximately seven years later a petition for a rehearing en banc was denied by 2 judges of this Circuit (out of a panel of 3) in the case of *Independence Lead Mines Co. v. Kingsbury,* 175 F.2d 983 (1949). Chief Judge Denman, dissenting, stated (page 992):

> "The attempt of two judges in a panel of three judges to deny a petition for rehearing en banc violates

the law as established in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, 62 S.Ct. 1301, 86 L. Ed. 1732, and Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 333 et seq., 62 S.Ct. 272, 86 L. Ed. 249.

The order of August 22, 1949, of this panel of this court does not truthfully describe its action. What it attempts to do is to deny a petition to the Court en banc for a rehearing by our whole court of seven judges. • • •

In view of the Supreme Court decisions cited above, it is too obvious to need argument that two judges cannot thus assume to act on a petition addressed to seven judges." (Emphasis ours.)

This is exactly what happened in the instant case. Furthermore our petition addressed to all 7 judges and requesting specifically a rehearing en banc—based, among other things, upon the vigorous dissent of Judge Pope *was not presented* to the 7 judges but *only to* the 3 judges of the panel, Judges Healy, Bone and Pope (R. 2226). The order at page 2226 of the record, quoted above, shows that only Judges Healy and Bone acted in denying the petition for rehearing en banc below. It will be noted also, in line with Judge Denman's dissent in the *Independence Lead Mines* case that the order (R. 2226) by "the Court" referred to above "does not truly describe its action." The order below is an "order denying petition for rehearing." No mention whatever is made of the fact that the petition—expressly addressed to all 7 judges—was a petition for *rehearing en banc.* The order also states that it is made "upon consideration thereof, *and by direction of the Court*"—despite the fact that the petition was presented only to 3 judges out of 7 and denied by 2 judges (R. 2226).

The practice in the Ninth Circuit of two judges denying a petition addressed to the full Court seems not to have been repeated after the Independence Lead Mines case until the denial of the petition for rehearing en banc by Judges Healy and Bone in this case. Instead in *Kronberg v. Hale*, 181 F.(2d) 767 (Feb. 1950) the Ninth Circuit (per curiam, before Judges Healy, Orr and McAllister) inaugurated the procedure of *striking* a petition for a rehearing en banc "as being without authority in law or in the rule or practice of the court."

In May, 1950 an identical order striking the petition was made in two cases, on the authority of the Kronberg case, by a panel consisting of Circuit Judge Bone and District Judges Goodman and Mathes—see *Freuhauf Trailer Co. v. Myers*, 181 F.2d 1008, and *Northwestern Mutual Life Insurance Company of Milwaukee v. Gilbert*, 182 F.2d 256.

On January 23, 1952, our petition for rehearing en banc addressed to the Chief Judge and all the Circuit Judges of the Court below was not "stricken" as in the *Kronberg, Freuhauf* and *Gilbert* cases—but was "denied" by two judges of the Ninth Circuit panel without any reference to the fact that the petition specifically requested a hearing en banc by the full court.

Seven days later on January 30, 1952, in *Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al.* (Circ. 9—No. 12,506) the prior procedure of striking a petition for rehearing en banc was resumed —the petition being stricken on the authority of the *Kronberg* case by Circuit Judge Healy and District Judge Byrne—District Judge Fee dissenting. There is now pending in the Court of Appeals for the Ninth Circuit a

petition in the *Western Pacific* case "for leave to file a motion to vacate order striking appellant's petition for rehearing en banc and reinstating such petition."

We respectfully submit that petitions addressed to the full court for a rehearing en banc should be entitled to such consideration that a denial of the petition results *only when a majority of the individual judges are unwilling to grant it.*

PETITION FOR REHEARING EN BANC WAS PARTICULARLY APPROPRIATE IN THIS CASE

In our petition, we pointed out — as a ground for rehearing by the full court — the divergence of views expressed by the various judges of the Ninth Circuit on matters involved in the decision. We respectfully submit, as we did in our rehearing petition, that the view of the 2 judges who affirmed the judgment does not represent the view of the majority of the 7 judges—and that Petitioner has been the victim, with deference, of the happenstance that a majority of the 3 judges who sat represented a view that is the view of only a *minority* of the full court.

We bottom this suggestion on the expressed views of the members of the court. We believe that *Southern Pacific Co. v. Guthrie,* 186 F.2d 926, decided by the full court on rehearing (Circ. 9) and *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (Circ. 9) demonstrate that the result in the instant case reflects a view which is not the view of the majority of the members of this court. The very purpose of the petition for rehearing was to point this situation out to the full court and it did so.

With deference, we suggest that the decisions of this Court indicate that had the case at bar been submitted

to the full court, Chief Judge Denman and Judges Stephens, Mathews and Orr could well have been of the view that the result is so shocking that a proper exercise of their function would call upon them to relieve the appellant from a plain injustice. Judge Pope has spoken in this case. But the judgment is, nevertheless, affirmed by Judge Healy writing an opinion dictated by views, we submit with deference, *not* harmonious with the views of the majority of the Court—concurred in by Judge Bone, who said in the *Guthrie Case* that the Court had no power to consider the question there presented. These 2 judges alone denied the petition for a hearing en banc. The granting of that petition was urged below because of our conviction that there is a cleavage based upon divergent views of the function of judges of the Ninth Circuit.

As to this case itself we submit that it should not be permitted to stand as a precedent for what can be allowed for punitive damages or as an invitation to counsel to get such results by a planned and sustained campaign of flagrant misconduct to arouse the passions and prejudices of the jury by suggestions by counsel, unsustained by the evidence and without intention or attempt to sustain them, —by practices universally condemned. (See the petition for rehearing and dissent of Judge Pope.)

If the opinion of the majority in this case, that is, 2 judges out of 7, is to be the rule in the Ninth Circuit—when, if ever, can it be said that a record contains a basis for a claim that any verdict was given under the influence of passion and prejudice in the light of the persistent course of conduct pursued by counsel for respondent in propounding inflammatory questions to petitioner's witnesses osten-

sibly for the purpose of impeachment but never followed through?

In the majority opinion—in reference to the impeaching questions not attempted to be followed up by evidence that the witness had in fact made the statement—it is stated:

> "We think one need not approve tactics of this sort in order to reject appellant's argument."

The affirmance of this case will be nothing less than an approval of such tactics—inviting, as here, grossly excessive verdicts. If this statement stands, no attorney need have any inhibitions in the trial of a case and may intentionally ask any question, under the guise of impeachment, placing in the record by inference, any evidence no matter how damning and inflammatory it may be; and instead of courts administering justice under the law, justice will be perverted and something else will be administered instead of justice.

It serves little to *say* the court does not approve where its *holding does approve* the result.

The 2-judge panel opinion will clearly reflect itself in the future if allowed to stand. It marks a sharp departure—a decision in conflict with judicial antecedents, and with certain prospect of progeny.

These fundamental issues we *attempted* to place before *all* of the Ninth Circuit judges.

STAY

Unless stayed the mandate of this Court will go down on receipt of the mandate of the Supreme Court of the United States. It is submitted that this Court's mandate should be stayed pending consideration of this petition.

WHEREFORE, appellant and petitioner prays that this petition be granted, that it be allowed to file and make its motion and that a time for hearing of the same be set or such further steps designated as the Court may deem appropriate.

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Attorneys for Appellant
Bradley Mining Company,
a corporation.

(Appendices follow)

APPENDIX I

United States Court of Appeals for the Ninth Circuit

No. 12,684, p. 2226

Excerpt from Proceedings of Wednesday, January 23, 1952.

Before: Healy, Bone and Pope,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered, by Circuit Judges, Healy and Bone, that the petition of appellant, filed January 18, 1952, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX II

In the United States Court of Appeals for the Ninth Circuit

No. 12,684

BRADLEY MINING COMPANY, A Corporation,
Appellant,

vs.

EDWARD H. BOICE,
Appellee.

MOTION TO VACATE ORDER DENYING APPELLANT'S PETITION FOR A REHEARING EN BANC AND REINSTATING SAID PETITION AND DETERMINATION THEREOF BY THE FULL COURT.

Appellant, Bradley Mining Company, a corporation, hereby moves the full court for an order vacating the purported order of January 23, 1952, denying this appellant's petition for rehearing en banc and reinstating said petition for action thereon by the full court.

This motion is based on the records and files of this court and is made on the ground that rehearings en banc are authorized by 28 U.S.C. § 46(c), that a petition for a rehearing en banc is an appropriate procedure under said section and under the decisions in *United States ex rel. Robinson v. Johnston,* 316 U.S. 649, and *Textile Mills Securities Corp. v. Commissioner,* 314 U.S. 326, and that agreeably to the law and decisions in such cases cannot be denied by less

than a majority of the full court, that appellant is entitled to action on said petition by all of the Judges of the United States Court of Appeals for the Ninth Circuit who are in active service and that less than a majority of said Judges cannot deny said petition without the submission of said petition to the other said Judges. Said motion is made on the further ground that said purported order of January 23, 1952, is a nullity and that appellant's petition for a rehearing en banc is still pending and undisposed of. Appellant re-asserts the grounds stated in said petition.

Dated: May 7, 1952.

JOHN PARKS DAVIS,
OSCAR W. WORTHWINE,
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ARTHUR B. DUNNE,

Attorneys for Appellant Bradley Mining Company, a corporation.

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FILED
JUL 21 1952
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1952 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Brief of Respondent in Opposition to Petition for Rehearing of Order Denying Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM 1952

No. 648

BRADLEY MINING CO., A Corporation, *Petitioner,*

vs.

EDWARD H. BOICE, *Respondent.*

Brief of Respondent in Opposition to Petition for Rehearing of Order Denying Petition for Writ of Certiorari

I

RULE 33 OF THIS COURT DICTATES THE DENIAL OF PETITIONER'S PETITION FOR REHEARING.

The sole ground upon which petitioner seeks to justify the filing of its petition for rehearing appears at page 1 of the petition:

> "This petition for rehearing is filed agreeably to paragraph 2 of Rule 33, upon what is believed

to be a substantial ground available to petitioner *although not previously presented as a ground for certiorari* * * *." (Emphasis ours).

Paragraph 2 of Rule 33 refers to the case of *Schriber-Schrath Co. v. Cleveland Trust Co.*, 305 U. S. 47, to illustrate the question of a substantial ground not previously presented. It is readily apparent from an analysis of the Schriber case, supra, that it has absolutely no application to the facts presented in this petition for rehearing. In that case petition for certiorari was denied, but a petition for rehearing was granted which disclosed that notwithstanding the doubtful validity of the patents in litigation, later conflict of decision was improbable because of the concentration of the industries using the patent in one circuit. By no stretch of reasoning can the criterion laid down in the Schriber case find a parallel here.

Petitioner states in its petition that the question of the denial by two judges of the panel of the Ninth Circuit of its petition for a rehearing en banc was never presented to this Court. Counsel for Petitioner, however, reluctantly admit that the question actually was submitted to this Court prior to the order denying certiorari, but a pathetic attempt to qualify is made by stating that the question was not presented as a "grounds" for certiorari.

This question was referred to in the reply brief of Petitioner dated April 22, 1952. Commencing at page 4 under the heading "Record Refutes Determination

by Majority of Ninth Circuit Judges" the position of Petitioner is fully stated therein that although a petition for rehearing was directed to the Court en banc, two judges of the division which heard the case denied the petition.

Again in its supplement to reply brief, dated April 29, 1952, Petitioner fully, elaborately and in as great detail as is found in its present application to this Court, presented the specific question here again raised. Petitioner argues that this Court did not consider the matters raised in its supplemental brief, and in its reply brief, but we are not prepared to make such an unwarranted assumption. This Court had submitted to it a full presentation of every argument of Petitioner, including those here advanced in its petition for rehearing, prior to the issuance of its order on May 5, 1952 denying the petition for certiorari. Counsel for Petitioner attempt to circumvent the requirement of the Schriber case by stating that the question of two judges of the circuit denying an application for rehearing en banc was "*suggested only*" in a supplement to petitioner's reply brief which petitioner felt it necessary to file." (Petition for Rehearing, Page 9).

This attempt to minimize the effect of Petitioner's having raised the question heretofore is incredible. No new argument has been presented here, with the possible exception of the reference to the Hearings before the Subcommittee on Judiciary, S. 1053—the garbled quotations of Petitioner pulled from the context of that Report having studiously avoided the full impact on its case of the intent and language of the *full* Report.

We will discuss this Report in some detail later in this brief.

Petitioner has fully discussed the Ninth Circuit practice of the division of the Court that initially heard and denied a case acting upon applications for en banc rehearings. Petitioner has established without question the consistent practice long before January 23, 1952, the date upon which its petition for rehearing en banc before the Circuit Court was denied, that a division or panel of the court acted on such petitions either denying or striking the petitions, if they were not granted. That practice in the Ninth Circuit, above referred to, existed at the time Petitioner filed its request for certiorari in this Court, so the matter can not conceivably be an "intervening circumstance of substantial or controlling effect." Further, Messers Dunn, Davis, Worthwine, Breshears and Donart, counsel for Petitioner during all of the appellate phases of this case, are all experienced counsel and practitioners in the Ninth Circuit, and their failure to raise a purported objection to a practice which existed can not possibly be considered an intervening circumstance sufficient to justify the granting of this petition for rehearing.

Apparently, Petitioner relies upon *Western Pacific Railroad Corporation et al v. Western Pacific Railroad Company et al*, in the United States Court of Appeals for the Ninth Circuit No. 12506, as giving it some basis for a rehearing by this Court. As previously indicated the questions raised in the Western Pacific

case, supra, are not new in the Ninth Circuit. The Court of Appeals for the Ninth Circuit has consistently followed the practice of permitting the division of the Court which initially heard the case to determine petitions for rehearing en banc, unless such rehearing is ordered by a majority of the active judges of the circuit. This is well established by the cases cited by Petitioner, all of which were rendered prior to the petition for certiorari in this case. The Western Pacific case, supra, is merely another case pending in the Ninth Circuit; it is completely separate and distinct from the case at bar and has no possible connection with, or relation to it.

Petitioner seeks to change long-established rules of appellate procedure, by insisting that it is *mandatory* upon all of the active judges of a circuit, to affirmatively refuse to grant a petition for rehearing, before it can be denied. It would seek to have its cause determined first by a panel of the entire Court and then if dissatisfied, it would, as a matter of right, look to the entire court for relief. It appears to us that this practice would be very little different from requesting a trial of a matter before a court initially, and then if the decision of the court were adverse, procuring a jury trial ab initio, again as a matter of right. We do not think that 28 U.S.C. Sec. 46 (c) can be subjected to such a tortured construction.

II

REHEARINGS EN BANC ARE DISCRETIONARY WITH THE COURT OF APPEALS

Prior to the enactment of 28 U.S.C. Sec. 46 (c) this Court decided the case of *Textile Mills Securities Corporation v. Commissioner*, 314 U. S. 326; at that time there was no statutory provision either specifically authorizing or prohibiting a hearing en banc before all of the active members of the U. S. Court of Appeals.

This Court therein held that the action of the Court of Appeals for the Third Circuit, sitting initially en banc, of their own motion, with all its active Judges participating, was proper.

Subsequently 28 U.S.C. Sec. 46 (c) was enacted by Congress which provides as follows:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

As pointed out in the reviewer's notes, this section preserves the *power* of a Court of Appeals to hear cases en banc as established by Textile Mills Securities Corporation v. Commissioner, Supra.

Petitioner now urges upon this Court that this statute goes far beyond the confirmation of this power

in a Court of Appeals to order a hearing or rehearing en banc, and in fact is a mandatory requirement upon a Court of Appeals that all of the active Judges thereof must consider the case upon a mere filing of a petition for rehearing en banc by a litigant receiving an adverse decision at the hands of the three Judge panel. Such a contention does violence to the language of this Act.

The first clause provides that "Cases and controversies shall be heard and determined by a court or division of not more than three judges"; thus it is clearly contemplated that the usual and ordinary method of determining litigation by a Court of Appeals is by a three judge panel. Secondly, the balance of this sentence is merely an empowering clause so that a Court of Appeals may act en banc in its sole discretion. It in nowise compels every active member of a Court of Appeals to consider each controversy at the request of counsel.

Were Petitioner's construction of this statute to be upheld, not only would there be a gross extension of the language and intent of the statute, but it would also result in a heavily increased burden upon the Courts of Appeals. The preparation and filing of a Petition for rehearing en banc is a relatively simple and inexpensive procedure. Were all of the active judges *required* to consider such a petition and to review the case even to the extent necessary to intelligently pass upon such a petition, it must be presumed that such petition would be filed in almost every case

by the losing party. Such an excessive burden imposed upon the circuit judges, particularly in the larger circuits, would seriously interfere with the orderly and expeditious handling and determination of normal judicial business.

S. 1053 was introduced in the 77th Congress to amend Sec. 212 of old Title 28 U.S.C. It was not enacted but its provision concerning hearings en banc is substantially that found in 28 U.S.C. Sec. 46 (c). Judge Groner appeared before the Senate Subcommittee on Judiciary on S. 1053, and concerning the advisability of the *power* of a Court of Appeals to sit en banc stated:

> "I think it is a desirable thing to do, to have the power. Not to exercise it ordinarily, because you would clog up your business, but in an extraordinary case, in a case of importance, why, I think it is extremely important." (p. 40).

Thus it is apparent that under 28 U.S.C. 46 (c) a Court of Appeals was to be given wide latitude in the exercise of its power to hear or rehear cases en banc, and such hearings were to be left to the sole discretion of the Court of Appeals.

This position is further supported by the hearings before the Subcommittee on Judiciary on S. 1053:

> "Senator Danaher. Let's confine ourselves to the language of the proviso. On whose motion would the court assemble en banc?

Mr. Holtzoff. I do not know. I did not draft this language.

Senator Kilgore. It states 'the majority of the circuit judges may provide for a court.'

Senator Danaher. Who is going to make a motion that the whole court sit on this case? The counsel in the case?

Mr. Chandler. The counsel can make a suggestion, of course.

Senator Danaher. In every case I had in the circuit court of appeals I thought it was the most important one in that term and I wanted the whole court to sit on it. Just let us assume such a fantastic situation, if a man was possessed of such ego, to be facetious. How are you going to get the court acting to convene the majority of the entire bench, to decide whether they would or would not sit as an entire court en banc?

Mr. Chandler. Senator, that is, of course, something within their discretion. They cannot be compelled to summon the whole court." (p. 16)

Also see the following:

"Senator McFarland. Just looking at that provision, I would be of the impression that it was placed in there for this reason, that sometimes when they had a court made up of three judges and those three judges decided it was very important, they would rather have a full court who would be the ones to decide that rather than to

have the counsel making the motion. If they thought the question was of such importance, they would rather have a full court, and they would be the ones to do the acting.

Mr. Chandler. That was what I was about to suggest. I had hoped the convening of the full court would be at the initiative of the court. Perhaps if this became a law and if counsel wanted to make a suggestion, no doubt the court would listen to the counsel's suggestion, but certainly I would not think it desirable to encourage the initiation of this suggestion by counsel." (p. 17)

Likewise it would be well to repeat the full quotation found in part on page 9 of Petitioner's Petition for Rehearing:

"Senator Danaher. Judge Groner, do you gentlemen of the bench have any thought to give us as to how we are going to let a majority of the circuit judges decide, and how long in advance of the term, if you choose, when they are going to convene the court en banc?

Judge Groner. Well, I never thought of that. My own thought in the administration of my own court would be that it would not be done unless counsel requested it, or unless the court of its own motion, *growing out of an extraordinary condiction such as Judge Parker has mentioned, or conflicting decisions by two divisions of the court* deemed it advisable. *I think the purpose of the act*

is merely to make it permissive." (p. 40). (Emphasis ours.)

The italicized portion of this quotation was omitted by Petitioner.

There was clearly no question in the minds of the committee but that the exercise of this power was to be left to the Courts of Appeals. It is a permissive function, and neither the time nor the manner of its exercise was imposed by law.

Textile Mills Securities Corporation v. Commissioner, supra, heavily relied upon by Petitioner, goes no further. It merely gave the sanction of this Court to an original hearing en banc, on the initiative of the Court of Appeals, prior to 28 U.S.C. Sec. 46 (c).

Likewise U. S. ex rel. *Robinson v. Johnson*, 316 U. S. 649, merely gave the petitioner therein leave to apply to the Court of Appeals for a hearing en banc. Subsequently the Court of Appeals for the Ninth Circuit on its own motion ordered an en banc hearing. 130 Fed. 2d 202 (Circ. 9).

In the exercise of its discretion the Ninth Circuit Court of Appeals, acting through a three judge panel, has stricken petitions for rehearing en banc, as indicated in the cases cited by Petitioner: *Kronberg v. Hale*, 181 Fed. 2d 767 (Circ. 9); certiorari denied, 339 U.S. 969; *Fruehauf Trailer Co. v. Myers*, 181 Fed. 2d 1008 (Circ. 9); certiorari denied, 340 U.S. 827; rehearing on petition for certiorari denied, 340 U. S. 885; *Northwestern Mutual Life Insurance Co. v. Gil-*

bert, 182 Fed. 2d 256 (Circ. 9); certiorari denied, 340 U. S. 818.

Likewise in *Independence Lead Mines Co. v. Kingsbury*, 175 Fed. 2d 983 (Circ. 9), the Court of Appeals, by a division thereof, denied a petition for rehearing en banc. Certiorari denied, 338 U. S. 900 (Petition for writ of certiorari in that case specifically raised the question now presented by petitioner in the case at bar).

From these cases Petitioner seems to conclude that a rehearing en banc is not available in the Ninth Circuit. The most that can be said is that in these particular cases the Ninth Circuit Court of Appeals, in the exercise of its judicial discretion and under its authority to administer its judicial functions, did not order a rehearing en banc by a majority of the judges, and therefor, under 28 U.S.C. Sec. 46 (c), the decision of the three judge panel was final.

The Ninth Circuit Court of Appeals has utilized this discretionary function, and, in such cases as it deems such an extraordinary action is warranted, has granted rehearings en banc before the full court. See for example, U. S. ex rel. *Robinson v. Johnston*, supra; *Hopper v. U. S.*, 142 Fed. 2d 181 (Circ. 9); *Southern Pacific Co. v. Guthrie*, 186 Fed. 2d 926 (Circ. 9).

Under the reasonable construction of 28 U.S.C. Sec. 46 (c), and consistent with the rapid and careful administration of the business of the Courts of Appeals, the granting of petitions for rehearing en banc must of necessity be at the sole discretion of the Court. A

losing party should not, as a matter of right, be allowed to force all of the Judges of a Circuit to review his case and pass upon his petition.

CONCLUSION

The petition for rehearing of order denying petition for writ of certiorari should be denied.

Respectfully submitted.

Dated July 18, 1952.

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OCT 3 1952

In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A corporation,
Petitioner,

v.

EDWARD H. BOICE,
Respondent.

Supplement to Petition for Rehearing of Order Denying Certiorari and Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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Appendix B—Supplement to Dissenting Opinion of Chief Judge Denman—Western Pacific Railroad Corporation v. Western Pacific Railroad Company, Circ. 9, No. 12,506—filed September 11, 1952.

Appendix C — Majority and Dissenting Opinions — Bradley Mining Co. v. Boice, Circ. 9, No. 12,684—filed August 27, 1952.

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In the Supreme Court of the United States

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No. 648

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Respondent.

Supplement to Petition for Rehearing of Order Denying Certiorari and Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable The Associate Justices of the Supreme Court of the United States:

In a matter entitled as above and numbered October Term 1951, No. 648, your petitioner filed in this Court a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This was denied. Meanwhile the question now involved had arisen in a case pending in the United States Court of Appeals for the Ninth Circuit entitled and numbered *Western Pacific Railroad Corporation v. Western*

Pacific Railroad Company, No. 12506. That case has now been presented to this Court by petition for certiorari, as yet undisposed of, and here as October Term 1952, No. 150. Developments in this case (*Bradley Mining Co. v. Boice*) and in the *Western Pacific Case* in the Ninth Circuit up to June 24, 1952, were presented by us to this Court in this case in a petition for rehearing of the order denying our petition for certiorari.

Since then there have been further developments in the Ninth Circuit in both our case and in the *Western Pacific Case* which should be drawn to the attention of the Court. They are of such nature that it is difficult to know whether this should be by a supplement to our petition for rehearing of the order denying our petition for certiorari or whether these matters should be presented by a new petition for certiorari. We ask that this application be considered in whatever light is appropriate and that if properly it is a new petition for a writ of certiorari that it be so treated and that it be deemed to incorporate by reference the matters set out in our petition for rehearing of the order denying our original application for writ of certiorari.

STATEMENT OF NEW MATTERS

We pointed out in our petition for rehearing of the order denying our original petition for writ of certiorari that in the *Western Pacific Case*, as in our case, a petition to the United States Court of Appeals for the Ninth Circuit to rehear the case en banc had been denied by two of the three judges constituting the division which originally heard the case (the third judge of the division in each case having filed strong and documented dissents on the merits); that in

the *Western Pacific Case* application had been made for leave to file a motion to vacate the order striking the petition for hearing en banc and that in this case (*Bradley Mining Co. v. Boice*) we had filed in the Ninth Circuit an application, addressed to the full court, for leave to file a motion to vacate the order denying our petition for a rehearing en banc. *After* these matters were drawn to the attention of this Court in our petition here for a rehearing of the order denying certiorari, the two applications just mentioned and made to the United States Court of Appeals for the Ninth Circuit were acted upon by that court.

(1) On July 9, 1952, the United States Court of Appeals for the Ninth Circuit, the full court of seven circuit judges sitting and participating, denied the petition of Western Pacific Railroad Corporation for leave to file a motion to vacate the order striking the petition for rehearing en banc, six of the judges concurring and Chief Judge Denman filing a vigorous dissent. These opinions are appended hereto as Appendix A.

(2) On September 11, 1952, Chief Judge Denman, in the *Western Pacific Case,* filed a supplement to his dissenting opinion pointing out a conflict between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the District of Columbia "on the question of the right to consider a petition or motion for rehearing en banc where made by a litigant alone or by a single judge in the division which has decided the case." We attach a copy of that supplement hereto as Appendix B.

The decision in the *Western Pacific Case* seems to establish the rule for the Ninth Circuit by a decision of the full court, the Chief Judge strongly dissenting, that a litigant

who has had a case decided against him by two judges of a three judge division of that court cannot, as matter of right, apply for a rehearing by the full court but that any such application may be disposed of by the same two judges who constituted a majority of the division that decided the case in the first instance without calling the matter to the attention of the other judges who constitute a majority of the Court—even where the third judge of the division not only files a dissent on the merits but recommends a rehearing by the full Court.[1]

(3) On August 27, 1952, in this case (*Bradley Mining Co. v. Boice*) the division—which originally decided this case (Judge Pope dissenting) and which denied our application to the full court for hearing en banc—entertained and took up our application for leave to file a motion to vacate the order by two judges denying our petition for rehearing en banc, and denied the application for leave to file that motion. Judge Pope filed a dissent *and a recommendation for rehearing by the full court.* Unlike the proceeding in the *Western Pacific Case* our application was not passed on by the full court. Evidently the two circuit judges who denied our application (Circuit Judges Healy and Bone) assumed that the decision in the *Western Pacific Case* had established the rule for the Ninth Circuit that they could dispose of the matter without drawing it to the attention of the full court —despite Judge Pope's recommendation for a rehearing en banc. The opinions of August 27, 1952, in our case are

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[1]Indeed, as a matter of Ninth Circuit practice, the Clerk distributes petitions for rehearings en banc *only* to the three judges of the particular division to which the case has been assigned originally. See Judge Denman's dissent, Appendix A, pages 9, 10: "Since *Kronberg v. Hale*, the Clerk has distributed no petitions for rehearings en banc to the non-participating Circuit judges."

appended hereto as Appendix C and will be found in the supplement to the record in this case, Volume VII.

The decision in our case of August 27, 1952, goes beyond the decision in the *Western Pacific Case*. In the *Western Pacific Case* the matter was drawn to the attention of the full court and the full court acted. In this case one of the three circuit judges of the division which acted, Circuit Judge Pope, was so much of the opinion that a hearing en banc would have brought a different result on the merits that he filed a strong dissent stating why he thought a hearing en banc was appropriate and the probability of a different result on the merits were such a hearing had. But the decision of the other two judges of the division forecloses him, apparently, from presenting his own views to the other four judges of the court or, if informally he did make them known, nevertheless the denial by two judges of the application forecloses the possibility of action by any of the other judges of the court.

We do not undertake to detail the opinions in the *Western Pacific Case* and in our case dealing with the practice in the United States Courts of Appeals where an application for hearing en banc is made. The various conflicting opinions are set out in full in the appendices hereto. We submit that they present important questions of practice in the United States Courts of Appeals which have not been but which should be decided by this Court.

1. Can two judges of a division of three judges of a United States Court of Appeals which consists of more than three judges (here seven judges), foreclose consideration of a petition for rehearing by the full Court by a denial of the petition by the same two judges of the division—despite the dissent and recommendation for rehearing en banc by the third judge of the division?

2. Is not the establishment of such a rule for the Ninth Circuit in conflict with the provisions of 28 USC §46(c)?

3. On these questions is there not a conflict between the Ninth Circuit and the United States Court of Appeals for the District of Columbia Circuit (see Chief Justice Denman's supplement to his dissenting opinion in the *Western Pacific Case*, Appendix B hereto)?

4. This Court in an opinion by Mr. Justice Douglas (*Textile Mills v. Commissioner*, 314 US 326, 333) pointed out that hearings en banc by United States Courts of Appeals were appropriate because by them "conflicts within a circuit will be avoided, finality of decision in the Circuit Courts of Appeals will be promoted. Those considerations are especially important in view of the fact that in our Federal judicial system, these Courts are the courts of last resort in the run of ordinary cases." Where it is evident from the dissenting opinion of one of the three judges of a division that on the subject in hand there is a conflict of view among the judges of a Court of Appeals made up of more than three judges and that probably the view of the majority of the division in the case in hand is out of harmony with the views of a majority of the judges of the whole court, can those two judges properly and appropriately foreclose a consideration by the full court and finally decide the case, as Judge Pope said in his dissent of August 27, 1952, "knowing that a majority of the judges who constitute this court would probably disagree"?

With respect to this last matter it is not inappropriate to point out that Judge Pope does not stand alone in his views of this case and that what he thinks the majority of the full court would do does not rest on guess as to unexpressed views because this very case is one of the

cases singled out for mention by Chief Judge Denman in his dissent in the *Western Pacific Case* (Appendix A) on this very question of intracircuit conflict.

The matter which we are presenting to this Court is something beyond an academic exercise. It involves not only conflicts between Circuits and within the Ninth Circuit—but also the proper interpretation of the provisions of 28 U.S.C. 46(c). We prefer to state this, not as a statement of counsel, but in the language of a member of the court below. This is Judge Pope's language, not ours:

> "In my opinion the circumstances make this particular case, in the light of the views expressed by all members of the court with respect to some of the problems here involved, one in which a hearing in bank should be granted. I think that we, as members of this division which heard the case originally, should recommend a hearing in bank and by our action invite all the judges to participate.
>
> "My views in this respect are not based upon the mere fact that I have disagreed with the result reached in the majority opinion here, nor upon my feeling that a grave miscarriage of justice has been given the stamp of approval by this court. Rather my views are based upon the demonstrable probability that were this case heard by all seven judges a different result would be achieved. A study of the views expressed by all seven of the judges in *Southern Pacific Company v. Guthrie*, 186 F2d 926, (1951), will disclose why I think it evident that a hearing in bank would produce a different result.
>
> "As I have pointed out in my previous dissent in this case, the verdict upon which judgment has been entered here has the vice not merely of being excessive in amount, but its validity is tainted by the errors in injecting into the case matters highly prejudicial and calculated to arouse the passion and prejudices of the jury. It is a stronger case than was *Guthrie*.

> "The point that I am making is that in any case where the division hearing the matter can say that there is a fair probability that all seven of the judges would arrive at a different conclusion than that expressed by a mere majority of a division, the case is an appropriate one for a hearing in bank. It is unthinkable to me that a division of the court may lay down a rule or enter a judgment knowing that a majority of the judges who constitute this court would probably disagree. That is this case and for that reason I think that a rehearing should be granted."

Our own analysis of the *Guthrie Case,* to which Judge Pope refers, will be found in our petition for hearing en banc in Volume VII of the transcript of record here.

The conflict within the Ninth Circuit, which is apparent, presents a deadly parallel to the situation which was presented in *United States ex rel. Robinson v. Johnston,* 316 US 649, and it is suggested that it would be as appropriate in this case as it was in the *Johnston Case* for this Court to vacate the orders of the division denying rehearing en banc and the motion to vacate that order and remanding the cause for consideration of the petition for rehearing by the full court.

Dated at San Francisco, California, September 30, 1952.

Respectfully submitted,

JOHN PARKS DAVIS,
OSCAR W. WORTHWINE,
ARTHUR B. DUNNE,
Attorneys for Petitioner.

RALPH R. BRESHEARS,
GEORGE DONART,
Of Counsel.

CERTIFICATE OF COUNSEL

The undersigned, counsel for Bradley Mining Co., a corporation, petitioner herein, certify that the foregoing supplement and petition is presented in good faith and not for delay and is restricted to matter not previously presented as a ground for granting a petition for certiorari.

JOHN PARKS DAVIS,
OSCAR W. WORTHWINE,
ARTHUR B. DUNNE,
Attorneys for Petitioner.

RALPH R. BRESHEARS,
GEORGE DONART,
Of Counsel.

(Appendices follow)

Appendix A

United States Court of Appeals for the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver,
Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Appellees.

No. 12,506
Jul. 9, 1952

IN RE PETITION OF WESTERN PACIFIC RAILROAD CORPORATION FOR LEAVE TO FILE A MOTION DENOMINATED "MOTION TO VACATE ORDER STRIKING APPELLANT'S PETITION FOR REHEARING EN BANC AND REINSTATING SUCH PETITION."

BEFORE: DENMAN, MATHEWS, STEPHENS, HEALY, BONE, ORR, and POPE, Circuit Judges

HEALY, Circuit Judge

Case No. 12,506, supra, upon its coming at issue in this court, was regularly assigned for hearing and determination to a court or division of three judges comprising Circuit Judge Healy and District Judges Fee and Byrne. Subse-

quent to argument and submission of the case the court handed down an opinion and order affirming the judgment of the district court, Judge Fee dissenting. ..... F. 2d ..... Thereafter the appellants petitioned for "rehearing and rehearing en banc," and the court on January 30, 1952, denied the petition, Judge Fee again dissenting. ..... F. 2d ..... Insofar as the petition sought a rehearing in banc it was ordered stricken as unauthorized by law or practice.

On March 10, 1952, the Western Pacific Corporation presented the petition for leave described in the caption. In its supporting brief it asserts that it is its right under the law to have its petition for rehearing considered and acted upon by all the circuit judges. On order of a majority of the circuit judges, the court has been assembled in banc for the purpose of announcing the principles of law and practice it deems applicable in respect of in banc hearings. This course is thought appropriate in order that litigants and the bar may be advised not only of the position taken by the court but of the reasons for it.[1]

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[1]In recent years it has become the custom of counsel almost as a matter of course to petition the full membership of the court for a rehearing in banc, upon suffering an adverse decision at the hands of a court of three judges. This hopeful concept of the right of litigants appears to stem from declarations in the dissenting opinion in Independence Lead Mines v. Kingsbury (1949), 9 Cir., 175 F. 2d 983, at p. 992, cert. den. 338 U. S. 900, to the effect that two judges in a court or division of three are without authority to pass upon or deny a petition for rehearing addressed to all the circuit judges.

The numerous petitions of this nature have been disposed of by the court or division concerned either (1) by ignoring the application for in banc action and treating the petitions simply as ordinary petitions for rehearing, or (2) by striking them insofar as they sought in banc action. The treatment has not in the least served to discourage losing counsel or to stem the growing tide of such petitions.

The governing statutory provision, 28 USCA §46(c), reads:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."[2]

The obvious intendment of this statute is to perpetuate the United States Courts of Appeals as courts of three judges in all cases save those in which an in banc hearing is ordered by all or a majority of the circuit judges. No doubt Congress was fully alive to the fact that these courts, despite the increase in their membership, would be unable to keep abreast of the constantly growing volume of judicial business unless they continued in all normal circumstances to function as courts of three.

Important light will be shed on the problem under inquiry if we examine the method pursued in the assignment

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[2]The section was enacted as part of the 1948 Judicial Code revision. In its entirety it reads as follows:

"§46. Assignment of judges; divisions; hearings; quorum

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

of cases, as prescribed by our Rule 4.[3] In practice the calendars for the court are tentatively made up by the chief judge in collaboration with the clerk. On these calendars each case is assigned for hearing and determination to a court or division of three named judges, unless it has been otherwise ordered. The proposed calendar is circulated among all the judges, and any designation or assignment may be modified or set aside by a majority. When the calendar is approved by the judges their action is uniformly manifested by their initialing the same, as is done in the case of court orders generally. Thus the calendar as finally adopted evidences or necessarily implies at least the tentative determination of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc. In the instances in which at the time of assignment it is agreed by all or a majority of the judges that a particular case should be heard and determined in banc, it is calendared as such.[4]

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[3]Rule 4, subdivisions 1 and 2, reads:

"ASSIGNING OF CAUSES FOR HEARING

"1. The calendars of the court shall be be made up by the Clerk under the direction of the Chief Judge subject to the approval of the majority of the judges.

2. The Chief Judge after conference with the Circuit Judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be modified or set aside by a majority of the judges."

[4]Since the decision in Textile Mills v. Commissioner, 314 U. S. 326 (1941) approximately thirty cases in all have been heard in banc in this circuit. Nineteen of these, or about two-thirds of the whole, were assigned to the court in banc at the time they were originally calendared. Perhaps more than half of the nineteen were cases of great public consequence, such, for example, as those growing out of the suspension during the war of the writ of habeas corpus and the institution of martial law in Hawaii, or cases involving the forcible removal of the Japanese from the Pacific Coast states.

It sometimes occurs, too, that examination of a case preliminary to hearing, or consideration of it after argument, leads the judges to whom it was assigned to conclude that it is an appropriate cause for in banc consideration, and they so indicate to the remaining judges. If the latter or a majority of all agree, the case is then reassigned for hearing by all the judges.[5]

If we examine the status of Case No. 12,506 in the light of this practice, it becomes apparent that it was calendared and heard by court order as one in which in banc consideration was not deemed requisite. There remains to inquire whether the losing party in the cause is at this juncture entitled as of right to have its petition for rehearing considered and ruled upon by a court composed of all the circuit judges.

The statute, it will be recalled, commits to a "court or division of three judges" the power to *hear* and *determine* the cases and controversies assigned to it. Obviously its determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision, subject to review only as prescribed by 28 USCA §1254. Circuit judges other than those designated to sit on such court or division are not members of it, and officially they

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Others were contempt matters involving claimed violations of the constitutional prohibition against self-incrimination.

There are no definite criteria that we know of by which to determine what cases are suitable for in banc consideration. However, causes of extraordinary public importance or those involving constitutional questions probably belong in the category.

[5]McCoy v. United States, 9 Cir., 169 F. 2d 776; Samuel v. United States, 9 Cir., 169 F. 2d 787; Tee Hit Ton Tribe v. Olson, 9 Cir., 160 F. 2d 525; Los Angeles Building & Construction Trades Council v. LeBaron, 9 Cir., 185 F. 2d 405; Price v. Johnston, 9 Cir., 159 F. 2d 234, 161 F. 2d 705.

play, and are entitled to play, no part in its deliberations at any stage. That this is so is made clear by subdivision (a) of § 46 (see Note 2 above) providing that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs." If regard be had for this mandate circuit judges may not intrude themselves, or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit.

A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals. If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate suggest to the nonparticipating judges that the case is one which ought to be reheard in banc; and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration.[6]

Adoption of the view currently being urged would render merely tentative or provisional the decisions of the court in 98 per cent or more of the cases that come before it. On petition of a dissatisfied party its decisions would automati-

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[6]This was the course followed in Hopper v. United States, 9 Cir., 142 F. 2d 181; Southern Pacific Co. v. Guthrie, 9 Cir., 180 F. 2d 295, 186 F. 2d 926; Evaporated Milk Ass'n v. Roche, 130 F. 2d 843; and Pacific Gas & Electric Co. v. SEC., 139 F 2d 298. In the **Hopper** case, supra, and to a lesser degree in Southern Pacific v. Guthrie, intracircuit conflicts were resolved. The other two cases cited in this note were nondescript matters.

cally be subject to a species of horizontal appeal which would completely nullify the prime statutory objective of effecting a division of the court's work. The judges other than those to whom the cases had been assigned would perforce be required to acquaint themselves with the issues and problems involved in the same painstaking manner as did their associates who had heard and determined the causes initially, and this without the latter's advantage of having heard oral argument. Obviously, unless he is prepared to stultify himself, no judge would undertake to rule upon petitions for rehearing without adequate and full study and investigation of the merits.

On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties.

It has been remarked by some commentators that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts. The hazard, we think, may easily be overestimated. It is minimized by the alertness of counsel and by informal and unofficial interchanges among the judges. Where conflicts occur they are capable of remedy by in banc action without wholesale duplication of effort, as our own practice and experience have demonstrated.

The petition for rehearing in this cause has already been authoritatively denied by the division to which the cause was assigned. The petition for leave to file, addressed to the court in banc, is denied.

From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing.

DENMAN, Chief Judge, dissenting from the court's holding that the circuit judges not participating in a division, here six of the seven such judges, (a) are without power to consider a litigant's petition for a rehearing en banc, and (b) where a rehearing or rehearing en banc has been denied by a division, are without power to vote to grant a rehearing en banc, if two of the division's judges, here with but one circuit judge, do not desire such a rehearing. This appears from the following language of the opinion:

> "A petition for rehearing in any such case, whatever its form or wording, *must necessarily*[1] be treated as addressed to and is *solely* for disposition by the court or division to which the case was assigned for determination. If the court *so constituted*, or a majority of its members, denies the petition, *that ends the matter so far as concerns the Court of Appeals.* If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate *suggest to the nonparticipating judges that the case is one which ought to be reheard in banc;* and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration."
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> • • • •

[1]Emphasis hereafter appearing in quoted matter is supplied.

"The statute, it will be recalled, commits to a 'court or division of three judges' the power to *hear* and *determine* the cases and controversies assigned to it. Obviously *its* determination of any such case or controversy is a decision of the Court of Appeals, and as such is a *final decision, subject to review ONLY as prescribed by 28 U.S.C. § 1254.*" Thus squarely is denied the power of the court en banc to review a division's decision in a "rehearing en banc . . . ordered by a majority of the circuit judges." See 28 U.S.C. 46 (c).

* * * *

"From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

In this case the Western Pacific Railroad Corporation, hereafter the Corporation, petitions the Court en banc for leave to file a petition for a rehearing en banc. The latter seeks to establish, inter alia, that the judgment of the division which heard the case decided the main issue therein contrary to the decision of a prior division of this court.

The division in the instant case, consisting of one circuit judge and two district judges, has ordered "stricken" a petition addressed to the seven judges constituting the court en banc. This order follows a precedent of similar strikings of petitions for rehearings en banc in the cases of Kronberg v. Hale, 181 F.2d 767 (Cir. 9), Fruehauf Trailer v. Myers, 181 F.2d 1008 (Cir. 9), Northwestern Mut. Ins. Co. v. Gilbert, 182 F.2d 256 (Cir. 9).

Since Kronberg v. Hale, the Clerk has distributed no petitions for rehearings en banc to the non-participating

circuit judges. From a casual remark of counsel in a social contact, I learned of the Corporation's instant petition and instructed the Clerk to distribute it to the six circuit judges not sitting in the division. But for this casual discovery and my suggestion that the stature and determination of the Corporation's counsel made it likely they would seek mandamus in the Supreme Court, the petition would have had the "striking" treatment of the above cases.

The court's opinion came after a conference originally called for the consideration of the adoption of the rule considered last in this dissent, which would have made the burden of such petitions one we easily could bear.

A. *The court's decision violates (as well as ignores) the Supreme Court's decision in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, a decision aimed to settle differences in the circuit's divisions.*

The case of Textile Mills Corp. v. Commissioner, 314 U.S. 326, held that notwithstanding the three-judge provision of section 212 of title 28, U.S.C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal.

The Third Circuit in C.I.R. v. Textile Mills Corp., 117 F. 2d 62 at page 70, in holding that its five circuit judges could sit en banc, states that otherwise they would not have the power to correct differing views of the judges in the divisions of the court such as the Supreme Court describes as occurring in the Fifth Circuit in John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181.[2]

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[2]Following this the Textile Mills case states at page 71:

. . . "Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially

The Supreme Court in its Textile Mills case at page 334 in affirming the Third Circuit and overruling our decision in Lang's Estate v. C.I.R., 97 F.2d 867, 869, where we held we could not sit en banc where two divisions of the court differed as to the law controlling, states of rehearings en banc[3] that:

> . . . "Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases . . ."

In enacting 28 U.S.C. § 46 (c) Congress codified the Textile Mills decision, the Reviser's Notes stating that that section "preserves the interpretation established by the Textile Mills case."

Prior to this codification of the Textile Mills decision, there was decided by one division of this circuit the case

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in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question . . ."

[3]What is said of the need of rehearings en banc for the then Third Circuit applies a fortiori today to the Ninth Circuit. The Third Circuit in the 1941 fiscal year had but five judges and 285 docketings. The Ninth Circuit has had an increase in population of six million in twelve years. In the fiscal year 1952 it had 446 docketings. On the national average of docketings for circuit judges the Ninth Circuit should have ten judges. It has seven judges but the Senate has passed a bill increasing the judgeships to nine and the House Judiciary Committee has agreed they are needed. No doubt within a year we will have nine judges with three divisions sitting simultaneously. That is to say, we have 56% more docketings and will have almost half again the number of divisions in which exist the hazard of conflicting decision referred to in the Textile Mills decisions.

of Robinson v. Johnston, 118 F.2d 998, and later in a division of three other judges, the case of Crockett v. United States, 125 F.2d 547. The two divisions differed on the controlling law. Certiorari was sought in the Robinson case before the Crockett case was decided and it was denied. A petition for rehearing in the Supreme Court was denied. The Crockett case was then called to the attention of the court in a second petition for rehearing which was granted. The order denying the petition for certiorari was set aside and the writ of certiorari granted. Certainly this action of the Supreme Court was purposeful and deliberate.

In granting certiorari the Supreme Court in United States ex rel. Robinson v. Johnston, 316 U.S. 649, held it was the duty of this court en banc to entertain a petition for leave to file a petition for rehearing en banc, for it vacated our judgment and remanded the case to us, stating:

> "... In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston, 118 F.2d 998, 1001, and Crockett v. United States, 125 F.2d 547, 548, 549), and in view of this Court's decision in Waley v. Johnston, ante, p. 101, reversing 124 F.2d 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including *leave* to petitioner to apply for a hearing before the court *en banc*. See Textile Mills Corp. v. Commissioner, 314 U.S. 326 ..."

The Corporation strongly urges the above contentions in its denied petition, all of which is ignored in this court's opinion. Instead it is said of the seeking of the leave to file the petition, that consideration of such action by any of the circuit judges not in the division (here six) would

be "to *intrude* upon a . . . division on which they have not by order of the court been directed to sit."

How absurd it was, one must conclude, for the Supreme Court to order such an intrusion in Robinson v. Johnston!

B. *The Cavalier Refusal of the Court to Consider the Contentions of the Corporation's Petition.*

The shabby treatment of the litigant and his counsel in refusing to consider their contentions and authorities comes after the court's claim that its opinion gives consideration to *"the principles of law • • • which it deems applicable to en banc hearings."*

No self respecting federal judge sleeps comfortably if he is conscious of having rendered an opinion deciding a case in which he has *purposely* failed to consider a substantial contention supported by authorities submitted to him and by such evasion has based his decision on a ground directly opposed to the evaded contention.

A possible explanation for the silent treatment of the litigant's contention and authorities in this case is that Robinson v. Johnston was deemed irrelevant because decided before the codification of the Textile Mills case in 28 U.S.C. § 46(c). That seems absurd, however, for the Supreme Court's construction of a law before its exact codification, as here, is applicable after codification. Otherwise, why in 28 United States Code Annotated are there the thousands of citations in sections of the Judicial Code, enacted in 1948, which codifies the then law and statutes?

C. *The Opinion's Absurd Misstatements Respecting the Assignment of Cases to the Court's Divisions.*

The opinion states:

> ". . . Thus the calendar as finally adopted *evidences* or necessarily implies at least the *tentative predetermination* of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc . . ."

The Supreme Court in the Textile Mills case has established a definite criterion for the rehearings en banc provided for in 28 U.S.C. §46(c). It is the only one there stated, though there are others. It is that conflicts of law between the decisions of two of the court's divisions are cause for rehearing en banc. By clearing the law en banc, the circuit does so for the 96.3% of litigation in which this court's decisions are final.

Such en banc action prevents the burden on the Supreme Court, such as in the certification of the question of such differing divisions in Lang's Estate v. C.I.R., 97 F.2d 867, 869, a burden the Supreme Court later refused to assume in its return of Robinson v. Johnston for our en banc consideration of our divisions' divergencies.

It is almost a rude question to ask, "How, in heaven's name, are the seven judges en banc to know tentatively or otherwise that the division to which they assign the case will thereafter decide it without conflict with a prior decision of a different division"? The phrase, "How, in heaven's name," is used advisedly, for our tentative decision would require divine omniscience.

The opinion states that another criterion is whether the case to be assigned to a division is "one involving constitutional questions."

The slightest reflection shows that the court en banc could make its tentative assignment of a case to a division because *not* involving a constitutional question only by examination of all the briefs in all the cases to be assigned to determine whether such a constitutional contention is at issue.

Were this truly what we have done, it would have involved a volume of judicial effort comparable to that the court's opinion seeks to avoid with petitions for rehearings en banc.

In the eleven years since the Textile Mills case, the Clerk advises, we have assigned to division over two thousand two hundred cases. In but nineteen cases, less than one per cent, have they been assigned to the court en banc. These were cases whose extraordinary importance had wide newspaper notoriety. In *none* of the remaining two thousand two hundred cases has the court en banc assigned them to division after an examination of the briefs for that purpose.

D. *Further to avoid considering the corporation's contention and authorities, the opinion misstates the source of the contention that rehearings en banc are needed to cure the divergence of divisions.*

On the source of this contention the court's opinion states, "It has been remarked by *some commentators* that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts."

"Some commentators"! To what extent will the court go in order to avoid mentioning that this hazard was stated

first by the Third Circuit in the Textile Mills case and on its appeal by the Supreme Court, and later implicitly by the Supreme Court in returning Robinson v. Johnston to this court because of the difference in viewpoint of our divisions. That is to say, in such holdings on the criterion of divergence, the Third Circuit and the Supreme Court are no more than mere commentators.

The opinion seeks to minimize the likelihood of a division overruling sub silentio a prior division's holding and this with the certainty of nine judges and three divisions in the near future.[4] The idea is that the judges in the division so acting, "by *in*formal and unofficial interchanges" with the nonparticipating judges, will advise the latter that the decision is at variance with that of a prior division. In my seventeen years on the bench I have had no associate so confess his mistaken act.

An examination of the three cases cited, supra, the Kronberg, Fruehauf Trailer and Northwestern Mutual cases, in which the petitions for rehearing en banc were stricken, shows that two of them were founded on such conflict of divisions and the third on conflicts in district court decisions on important matters. Also in the seven cases of Bradley Mining Co. v. Boice, 12684; Acheson v. United States, 12772; Independence Lead Mines Co. v. Kingsbury, 11959; Tanimura v. United States, 13014; California v. United States, 12184; Sunbeam Lighting Co. v. Sunbeam Corp., 12357, and Zamlock v. United States, 12753, the division judges refused consideration of the petition addressed to the seven and thus prevented the court en banc from con-

[4]See footnote 3, supra.

sidering the contention in each that the division's decision conflicted with the decision of a prior division.

E. *The court's confessed fear of the burden of an overwhelming volume of such petitions may be avoided by an amendment of its rules.*

Against a flood of such petitions we can protect ourselves, as has the Supreme Court, by amending our Rule 25 as follows:

"Rule 25.
REHEARING

"A petition for rehearing of a decision by a division of the court may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

"Where there has been a denial of a rehearing of a decision by a division, a petition for a rehearing in bank may be filed within fifteen days. The petition shall be in the form above described and with the same certificate of counsel. No petition will be entertained, unless one of the judges participating in that decision shall join in seeking such rehearing."

The Supreme Court has similarly protected itself on its petitions for rehearing by a provision in its Rule 33, of which the pertinent portion is:

"Such a petition . . . will not be granted unless a justice who concurred in the judgment desires it and a majority of the Court so determines."

In the last seven years there have been but 75 dissents, an average of less than 11 per year. Probably less than 11 judges per year would join in petitioning for a rehearing en banc.

In view of our prospective three divisions and the likely need for such rehearings en banc, an average of eleven such petitions would not be an intolerable burden, less than 4% of our submitted cases. It would substantially reduce the likelihood of conflict between the divisions.

By requiring first a rehearing by the division, the district judges would not be barred from the reconsideration of a decision.

The motion to file should have been considered on its merits and granted.

(Endorsed:) Opinion and Dissenting Opinion. Filed Jul. 9, 1952. Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals for the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuP. BAYARD, Receiver,
Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Appellees.

No. 12,506
Sep. 11, 1952

SUPPLEMENT TO DISSENTING OPINION OF CHIEF JUDGE DENMAN, FILED HEREIN ON JULY 9, 1952

Since the writing of my dissenting opinion herein I have been advised by Chief Judge Harold M. Stephens of the United States Court of Appeals for the District of Columbia that that court has rendered a series of decisions in conflict with the decision of this court on the question of the right to consider a petition or motion for rehearing in banc where made by a litigant alone or by a single judge in the division which has decided the case.

It thus appears that this case is of the character described in Rule 38 (5) (b) of the Supreme Court. The decisions of the Court of Appeals for the District of Columbia determining its practice there are those contained in the following communication to me from Chief Judge Stephens:

"Washington, D. C.
September 11, 1952

Honorable William Denman
Chief Judge
U. S. Court of Appeals
United States Post Office and Courthouse
San Francisco

My dear Judge Denman:

In response to your inquiry regarding the practice in this court with respect to hearings in banc and rehearings in banc under the provisions of Section 46 of Title 28 of the United States Code, I wish to advise as follows:

In determining in which cases to sit in banc, two methods have been followed in the United States Court of Appeals for the District of Columbia Circuit, namely:

/1/ Any judge or judges or any division of the court may request that a case be heard originally or reheard in banc. Such judge or judges or division of the court usually addresses a memorandum to all of the active circuit judges indicating why he or they thinks the case should either be heard or reheard in banc, and requests the judges to notify the chief judge of their votes on the request. If a majority favor the in banc hearing, and order to that effect is

entered and the case is scheduled for the in banc hearing or rehearing.

/2/ Any party to a case may by written motion or petition request that the original hearing or a rehearing to be held in banc. Such a motion or petition is submitted to and ruled upon by all of the active circuit judges of the circuit.

In the following cases rehearings in banc were ordered on the request of one member of the division of the court which originally heard the case:

No. 10446, Kephart v. Kephart, 193 F. 2d 677.

No. 11081, Quinn v. U. S. Not yet decided.

No. 10943, Emspak v. U. S. Not yet decided.

In the following case rehearing in banc was ordered on the request of a judge not a member of the division which originally heard the case:

No. 10063, Stewart v. Overholser, 186 F. 2d 339.

In the following cases the original hearings in banc were ordered on the request of the original division:

No. 11039, Thompson Co. v. D.C. Not yet decided.

No. 11044, D.C. v. Thompson Co. Not yet decided.

In the following case the original hearing in banc was ordered on the request of one member of the court:

No. 10473, Overholser v. Boddie, 184 F. 2d 240.

In the following cases rehearings in banc were ordered on the petition of one of the parties:

No. 10504, in the Matter of John W. Carter, 192 F. 2d 15.

No. 10854, Columbia National Bank v. D.C., 195 F. 2d 942.

No. 10846, Citizens Bank v. D.C., 195 F. 2d 946.

No. 10835, D.C. v. Catholic Education Press. Not yet decided.

Very truly yours,

/s/ Harold M. Stephens
Chief Judge of the United States Court of Appeals for the District of Columbia Circuit."

It is ordered that the above opinion be printed as a part of the record in this case and that a properly certified copy be sent to the Supreme Court of the United States as a part of the certiorari proceedings sought by Western Pacific Railroad Corporation

William Denman
Chief Judge

(Endorsed:) Supplement to Dissenting Opinion of Chief Judge Denman. Filed Sep. 11, 1952. Paul P. O'Brien, Clerk.

Appendix C

United States Court of Appeals for the Ninth Circuit

BRADLEY MINING CO., a corporation, *Appellant,* vs. EDWARD H. BOICE, *Appellee.*	No. 12,684 Aug. 27, 1952

BEFORE: HEALY, BONE, and POPE, Circuit Judges

PER CURIAM

In this case we affirmed a judgment against the appellant, one member of the court dissenting. 194 F. 2d 80. Appellant petitioned for a rehearing in banc, and rehearing was denied. Application for certiorari followed and was denied. 343 U. S. 941. Upon the coming down of the mandate appellant moved for leave to file a motion to vacate the denial of its petition for rehearing in banc and for the reinstatement of its petition. That motion is the matter before us for disposal.

The case was not in any aspect of such character as to suggest the advisability of its being heard or reheard in banc. It involved purely factual issues. Depending upon how the jury might evaluate the evidence, or how appraise the credibility of the witnesses, it was concededly a case in which both actual and exemplary damages were awardable. The charges made against the defendant, and presumably accepted by the jury as true on the evidence before it, were

for conduct of a nature calculated to blast at the threshold the efforts of a young doctor to establish himself in his profession. The problem presented bore scant resemblance to Southern Pacific Co. v. Guthrie, 186 F. 2d 926, and speculation as to the probable attitude here of the judges who participated in *Guthrie* has no perceivable basis.

The judge who presided at the trial, convinced that the jury was not motivated by passion or prejudice and that its verdict, while large, was not excessive, denied a motion for a new trial.* Being ourselves disinclined to usurp the functions of the jury or to invade the province of the district judge, and being, moreover, of opinion that the judge was right in refusing to disturb the verdict, we affirmed. Appellant has had its appeal and its opportunity for certiorari or other relief in the Supreme Court. It is not entitled to pursue the process a second time.

The motion for leave to file is denied.

POPE, Circuit Judge, dissenting.

I think that a just disposition of this case requires that the appellant be granted an opportunity to reargue the case before the court sitting in bank.

In a recent opinion of this court in bank in Western Pacific Railroad Corporation, et al., appellants, v. Western Pacific Railroad Company, et al., appellees, No. 12506, handed down July 9, 1952, the court, after denying the right of a defeated litigant to require all of the judges of the court to consider a petition for rehearing of a case originally heard by a division of the court, pointed out that it recognized that certain cases are appropriate ones for consideration by a court in bank. The opinion enumerated cer-

*92 F. Supp. 750.

tain types of cases which have frequently been treated in this manner.†

In my opinion the circumstances make this particular case, in the light of the views expressed by all the members of the court with respect to some of the problems here involved, one in which a hearing in bank should be granted. I think that we, as members of this division which heard the case originally, should recommend a hearing in bank and by our action invite all the judges to participate.

My views in this respect are not based upon the mere fact that I have disagreed with the result reached in the majority opinion here, nor upon my feeling that a grave miscarriage of justice has been given the stamp of approval by this court. Rather my views are based upon the demon-

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†I have a somewhat different view of the purport of the opinion in the Western Pacific Railroad Corporation case mentioned above than that which Judge Denman expressed in his dissent in that case. As I understand the majority opinion, it went no further than to hold that a disappointed litigant in the position of the appellant in that case could not, by filing a petition for rehearing in bank, require all the judges of the court to consider and pass upon that petition. I concurred in that opinion because in my mind a contrary holding would mean that the court would, as a practical matter, lose the opportunity which it now has to expedite its disposition of cases through the hearing of matters before divisions. For instance, in the present case the record fills four printed volumes comprising nearly 2000 pages and I know what a task it was to read that whole record. I do not think the statute intended that I, not a member of the division which heard the Western Pacific case, should have to read all the record in that case, as I might well find necessary in order to vote intelligently upon the petition.

There is language in subdivision (c) of §46 of Title 28 which would seem to grant to a majority of the circuit judges of the circuit the right to order a hearing or rehearing in bank in any case, a procedure which I am of course not proposing here. That is a question which was not determined by the majority opinion in the Western Pacific case, although Judge Denman seems to think that it was. Upon that question I reserve judgment until such time as determination becomes necessary.

strable probability that were this case heard by all seven judges a different result would be achieved. A study of the views expressed by all seven of the judges in Southern Pacific Company v. Guthrie, 186 F. 2d 926, (1951), will disclose why I think it evident that a hearing in bank would produce a different result.

As I have pointed out in my previous dissent in this case, the verdict upon which judgment has been entered here has the vice not merely of being excessive in amount but its validity is tainted by the errors in injecting into the case matters highly prejudicial and calculated to arouse the passion and prejudice of the jury. It is a stronger case than was Guthrie.

The point that I am making is that in any case where the division hearing the matter can say that there is a fair probability that all seven of the judges would arrive at a different conclusion than that expressed by a mere majority of a division, the case is an appropriate one for a hearing in bank. It is unthinkable to me that a division of the court may lay down a rule or enter a judgment knowing that a majority of the judges who constitute this court would probably disagree. That is this case and for that reason I think that a rehearing should be granted.

(Endorsed:) Per Curiam Opinion and Dissenting Opinion of Pope, C. J. Filed Aug. 27, 1952. Paul P. O'Brien, Clerk.

No. 648, October Term, 1951. BRADLEY MINING CO. *v.* BOICE. On petition for rehearing. *Per Curiam:* The petition for rehearing is granted. The order entered May 5, 1952, denying certiorari, 343 U. S. 941, is vacated and the petition for writ of certiorari is granted. The order of the division of the Court of Appeals denying petition for rehearing *en banc* is vacated and the case is remanded to the Court of Appeals for further proceedings in the light of *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U. S. 247, decided April 6, 1953. *John Parks Davis, Oscar W. Worthwine* and *Arthur B. Dunne* for petitioner. *William H. Langroise* for respondent.